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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1896**

State of Minnesota,
Respondent,

vs.

Michael Anthony Thurstin,
Appellant.

**Filed September 24, 2018
Affirmed in part and remanded
Peterson, Judge**

Crow Wing County District Court
File No. 18-CR-17-2502

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Donald F. Ryan, Crow Wing County Attorney, Mark Mitchell, Assistant County Attorney,
Brainerd, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Maria Villalva Lijó,
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Cleary, Chief Judge; and
Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

In this appeal from three convictions of firearms offenses following a court trial, appellant challenges the sufficiency of evidence that he possessed the firearms, the adequacy of findings on the essential facts to support the convictions, and the inclusion of

a fourth conviction in the warrant of commitment. Because we find the evidence and the findings on the essential facts sufficient to support appellant's three convictions, we affirm the convictions. But because the warrant of commitment incorrectly includes four convictions, we remand for correction of the warrant of commitment.

FACTS

On the evening of June 18, 2017, two Crow Wing County deputies, Kristopher Brose and Nathan Augustine, and their sergeant, Tyler Burke, received information that appellant Michael Thurstin was staying at a motel in the Deerwood area. After they discovered that room 2 at the Deerwood Motel was registered to Thurstin's female friend, S.K., they went to the motel to arrest Thurstin on an outstanding felony warrant.

When Burke drove up to the motel, he saw Thurstin, whom he recognized, and another male standing outside room 2, and he immediately arrested Thurstin. Burke directed S.K. and a third male, K.L., to exit room 2, which they did. During a consensual search of the room, the deputies discovered a 9-mm handgun, a .45 caliber handgun, a modified rifle with a pistol grip, ammunition, and two magazines, all located inside a collapsible blue bag that also contained men's clothing.

Thurstin was charged with three counts of possession of a firearm or ammunition by a person convicted of a crime of violence, in violation of Minn. Stat. § 624.713, subd. 1(2) (2016) (Counts 1-3), and one count of possession of a firearm or ammunition by a person convicted of a crime of violence, in violation of Minn. Stat. § 609.165, subd. 1b (2016) (Count 4).

At a trial to the court, S.K. testified that she did not remember many of the events that occurred on the night of June 18 because she had ingested methamphetamine and alcohol. But S.K. also testified that she did not have any guns with her when she went to the motel, and Thurstin, who had planned to stay there with her, brought “[a] backpack and like a hamper thing” that was blue. She identified the “blue-type duffle bag” as belonging to Thurstin, and, upon looking at a photograph of the blue bag found during the search of room 2, she agreed that it was “similar to the bag that Mr. Thurstin brought with him that night.” After being presented with evidence of the incriminating statements that she made to law enforcement on June 18, S.K. testified that she saw Thurstin cleaning the rifle and that he had two handguns in his possession, a 9-mm handgun and a .45 caliber handgun.

K.L. testified that he had no guns in room 2 and did not have personal belongings in the room other than a wallet, a phone, keys, and a phone charger. He helped carry bags into the room, but he did not remember seeing a blue bag.

Brose testified that he found the firearms in the blue bag and that the bag contained “[l]ots of clothing,” but it did not contain “any female clothing.” He also testified that when he interviewed S.K. shortly after Thurstin’s arrest, she told him that the blue bag where the guns were found belonged to Thurstin, she and Thurstin got a ride to the motel from K.L., they carried the bags into the motel with them, and Thurstin brought the blue bag with him. Brose also testified that S.K. told him that she saw Thurstin cleaning the rifle. Burke testified that S.K. told him that “Thurstin had possession of the rifle just prior to the deputies arriving on scene, and he had just placed it right inside the doorway.”

The district court found Thurstin guilty of all counts but entered convictions for only Counts 1-3. The district court imposed a 60-month sentence. Despite the district court's statement that Thurstin was not convicted of Count 4, the warrant of commitment states that Thurstin is "[c]onvicted" of Count 4 under Minn. Stat. § 609.165, subd. 1b.

Thurstin appeals.

D E C I S I O N

Sufficiency of evidence

In reviewing the sufficiency of evidence to support a criminal conviction, an appellate court must determine "whether, given the facts in the record and the legitimate inferences that can be drawn from those facts, a [fact-finder] could reasonably conclude that the defendant was guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476 (Minn. 2004) (quotation omitted). We consider the evidence in the light most favorable to the verdict and assume that "the [fact-finder] believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Porter*, 674 N.W.2d 424, 427 (Minn. App. 2004).

In Minnesota, a person who has been convicted of a crime of violence "shall not be entitled to possess ammunition or a pistol or semiautomatic military-style assault weapon or . . . any other firearm." Minn. Stat. § 624.713, subd. 1(2). Similarly, under the criminal code, a person who has been convicted of a crime of violence may not "possess[] . . . a

firearm or ammunition.”¹ Minn. Stat. § 609.165, subd. 1b(a). Possession, which is not defined in either statute, can be proved by establishing “either actual or constructive possession.” *Porter*, 674 N.W.2d at 427. Actual possession “require[s] proof that appellant physically had the [weapon] on his person.” *State v. Smith*, 619 N.W.2d 766, 770 (Minn. App. 2000), *review denied* (Minn. Jan. 16, 2001). “The mere fact that an item is not in a defendant’s physical possession at the time of apprehension does not preclude prosecution for actual possession of contraband.” *State v. Barker*, 888 N.W.2d 348, 354 (Minn. App. 2016).

Thurstin argues that “[t]he state did not prove beyond a reasonable doubt that [he] possessed the firearms found in the motel room.” The standard of proof in a criminal case is proof beyond a reasonable doubt. *State v. Peterson*, 673 N.W.2d 482, 486 (Minn. 2004). That standard may be met with direct or circumstantial evidence. *See Bernhardt*, 684 N.W.2d at 477. “[D]irect evidence is evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). Circumstantial evidence is “evidence based on inference and not on personal knowledge or observation.” *Bernhardt*, 684 N.W.2d at 477 n.11 (quotation omitted).

At trial, S.K. testified as follows:

Q: So before law enforcement showed up and you and Mr. Thurstin were in the room did he -- did you become aware that he had possession of any firearms?

¹ Thurstin does not challenge the evidence proffered by the state that he was previously convicted of third-degree assault, a crime of violence, in February 2017. *See* Minn. Stat. § 624.712, subd. 5 (2016) (defining “crime of violence”).

A: Yeah.
Q: And what did he have?
A: I don't remember.
Q: Okay. Do you remember whether or not the firearms -- what bag the firearms were carried into the hotel room in?
A: I don't know. I wasn't paying attention.
Q: Okay.
A: I wasn't sure what was in them.
Q: Okay. You're not sure what kind of gun he had there, but did you remember what he did with the gun that you saw him be in possession of?
A: I know he was cleaning something.
Q: Okay. Did you give a statement to law enforcement that night?
A: Yes.
Q: And you were telling the truth when you gave those statements to law enforcement?
A: I'm not -- yeah. To the best of my ability.
Q: Okay.
A: But I know I'd been drinking.
Q: Okay. I just want to show you the statement that you gave law enforcement that night.
....

Q: Just to yourself I just want you to read these first few sentences.

Does that help refresh your recollection of at least what you told law enforcement that night?

A: Uh-huh. Yes.
Q: What did you tell law enforcement that night? What kind of gun was it?
A: I guess I didn't read far. I don't know.
Q: Okay. Was it a long gun or a short gun?
A: I can't even remember, I mean --
Q: Okay. So I'm just going to ask you, again, to read to yourself to read the third A, which would be your answer.
A: This one?
Q: Yep.
A: That he was cleaning it.
Q: Does that help refresh your recollection a little bit more?
A: What?

Q: Of what he was doing with that gun.
A: He was cleaning it.
Q: Okay. Do you remember if you saw any handguns in Mr. Thurstin's possession that night?
A: Yep.
Q: Did he have some?
A: I believe so.
Q: How many?
A: Two.
Q: Okay. Do you remember -- were you able to identify, when you spoke with law enforcement, what kind of guns those were, caliber-wise?
A: 9. That's all I remember.
Q: Again, showing you your statement.
....

A: 9 and a .45.

Thurstin argues that S.K.'s testimony that she saw him "cleaning something" does not prove that he was cleaning the rifle. But it is clear from the context of the testimony that when S.K. testified that Thurstin was cleaning "it," she was referring to cleaning the rifle. The rifle had to be in Thurstin's possession when he was cleaning it. S.K. also testified that she saw two handguns in Thurstin's possession. S.K.'s testimony is direct evidence that Thurstin possessed firearms and, when we assume that the district court believed S.K. and we view her testimony in the light most favorable to the verdicts, the evidence is sufficient to support the district court's guilty verdicts. Because we conclude that direct evidence sufficiently supports the verdicts, we need not consider whether the verdicts are supported by circumstantial evidence.

Written findings of essential facts

The rules of criminal procedure provide:

(a) In a case tried without a jury, the court, within 7 days after the completion of trial, must make a general finding of guilty; not guilty; or if the applicable pleas have been made, a general finding of not guilty by reason of mental illness or deficiency, double jeopardy, or that Minn. Stat. § 609.035 bars the prosecution.

(b) The court, within 7 days after making its general finding in felony and gross misdemeanor cases, must in addition make findings in writing of the essential facts.

....

(e) If the court omits a finding on an issue of fact essential to sustain the general finding, it must be deemed to have made a finding consistent with the general finding.

Minn. R. Crim. P. 26.01, subd. 2.

Thurstin argues that the district court did not comply with the requirement in Minn. R. Crim. P. 26.01, subd. 2(b), that the court make written findings of the essential facts. “The purpose of written findings is to aid the appellate court in its review of [a] conviction resulting from a nonjury trial.” *State v. Scarver*, 458 N.W.2d 167, 168 (Minn. App. 1990). This court has remanded for written findings when the district court failed to comply with the rule. *See id.* at 168-69; *State v. Taylor*, 427 N.W.2d 1, 5 (Minn. App. 1988), *review denied* (Minn. Sept. 28, 1988). But, in both *Scarver* and *Taylor*, the district court made only a general finding that the defendant was guilty and made no written findings of essential facts. *Scarver*, 458 N.W.2d at 168; *Taylor*, 427 N.W.2d at 4-5.

Here, the district court made four written findings of fact to support its general findings of guilt: (1) Thurstin was present at the Deerwood Motel on June 18; (2) Thurstin possessed three firearms and ammunition that police found within his hotel room;

(3) Thurstin had a prior conviction of a crime of violence in February 2017; and
(4) Thurstin unlawfully possessed the firearms and ammunition on June 18, 2017. Thurstin contends that these findings do not state which witnesses the district court found credible or which evidence the district court found most probative and do not state whether the court's verdict was based on actual or constructive possession.

Such detailed findings are not necessary for our review. The district court found that Thurstin possessed three firearms and ammunition. The principal issue before us is whether the evidence is sufficient to support this finding. We can examine the evidence and determine whether it is sufficient without knowing whether the district court based its decision on actual or constructive possession or which evidence the district court found more credible or persuasive. Under our standard of review, we view the evidence in the light most favorable to the verdict and assume that the district court believed the state's witnesses. And, if the district court omitted an essential finding, we must deem the finding to have been made. *See State v. Oanes*, 543 N.W.2d 658, 663 (Minn. App. 1996) (stating that "after a bench trial, if the [district] court omits a factual finding essential to the merits of guilt or innocence, it shall be deemed to have made a finding consistent with the general finding"). Under these circumstances, we need not remand for additional findings.

Warrant of commitment

Finally, the parties agree that the warrant of commitment contains an error that must be corrected. "Clerical mistakes in a judgment, order, or in the record arising from oversight or omission may be corrected by the court at any time, or after notice if ordered by the court." Minn. R. Crim. P. 27.03, subd. 10. The warrant of commitment erroneously

states that Thurstin was “[c]onvicted” of Count 4, the violation of Minn. Stat. § 609.165, subd. 1b, even though the district court’s verdict properly refrained from convicting Thurstin on that count because a person may not be convicted and sentenced for violating both section 609.165 and section 624.713, subdivision 2. See Minn. Stat. § 609.165, subd. 1b(b) (stating that “[a] conviction and sentencing under this section shall be construed to bar a conviction and sentencing for a violation of section 624.713, subdivision 2”). We therefore remand for correction of the warrant of commitment to reflect that Thurstin was not convicted of Count 4.

Affirmed in part and remanded.